

NOT FOR PUBLICATION

SEP 30 2004

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

JUAN E. ALVARADO,

Petitioner - Appellant,

v.

LARRY SMALL, Warden,

Respondent - Appellee.

No. 03-17035

D.C. No. CV-99-04228-SBA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted September 17, 2004
San Francisco, California

Before: OAKES,** KLEINFELD, and CALLAHAN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable James L. Oakes, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

The state court's denial of Alvarado's ineffective assistance of counsel claim was not contrary to, nor an unreasonable application of, clearly established Supreme Court law.¹ Counsel's conduct is redolent of tactical judgments because, as the state court said, there were problems of admissibility, the girlfriend's changing stories, and the risk that evidence of the claimed prior beatings could hurt rather than help the defense's case.

We also deny Alvarado's sufficiency of the evidence claims. The state court decision was not contrary to, nor an unreasonable application of, Jackson v. Virginia² because, as the state court said, a reasonable person could conclude from the evidence that Alvarado "armed himself in anticipation of a fist fight," planning to kill people he knew were unarmed when they bothered him again. Jurors could conclude otherwise, but the "any rational trier of fact" test in Jackson was not contravened.³

AFFIRMED.

¹ 28 U.S.C. § 2254(d)(1).

² Jackson v. Virginia, 443 U.S. 307 (1979).

³ Id. at 319.